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Nos. 86-487, 86-543 and 86-559

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.
and ROBERT M. KOLACZYINSKI,
*Petitioners,*

v.

ESTELLE JACOBSON and CYNTHIA CARSON,
*Respondents.*

---

PAINE, WEBBER, JACKSON & CURTIS, INC.,
SMITH BARNEY, HARRIS UPHAM & CO., INC.
and DONALD J. PORTER,
*Petitioners,*

v.

MARILYN E. BURRIS
*Respondent.*

---

DEAN WITTER REYNOLDS, INC.,
*Petitioner,*

v.

HERBERT BLUMENTHAL,
*Respondent.*

---

**On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Third Circuit**

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## CONSOLIDATED BRIEF IN RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

The questions presented are:

1. Whether a pre-dispute agreement to arbitrate federal statutory claims is unenforceable where (1) Congress has conferred exclusive jurisdiction upon the federal courts to decide the claims; (2) Congress has not empowered the parties, by agreement or otherwise, to confer jurisdiction of claims on any other tribunal; and (3) arbitrators have no inherent power beyond that conferred by agreement of the parties to decide any of the parties' claims;

2. Whether a pre-dispute agreement to arbitrate a private cause of action under federal statutes is enforceable where such actions advance the public purposes of a federal, statutory, remedial scheme; and

3. Whether a pre-dispute agreement which waives the provisions of Section 27 of the Securities Exchange Act of 1934 in the context of claims asserted under Section 10(b) of that Act is unenforceable under Section 29(a) thereof as a stipulation waiving compliance with any provision of the Act.

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## STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth in the petitions for certiorari, the following is relevant to these cases:

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78 aa.

> The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

## STATEMENT OF THE CASE—PROCEDURAL POSTURE OF THIS CONSOLIDATED RESPONSE

The respondents are Estelle Jacobson and Cynthia Carson (the "Jacobson respondents"), appellants and cross-appellees in *Estelle Jacobson and Cynthia Carson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., and Robert M. Kolaczyinski*, 797 F.2d 1197 (3d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3259

(U.S. September 25, 1986) (No. 86-487) ("*Jacobson*"); Marilyn E. Burris ("Burris"), appellee in *Burris v. Paine, Webber, Jackson & Curtis, Inc.*, decided *sub. nom. Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra, petition for cert. filed,* 55 U.S.L.W. 3295 (U.S. October 1, 1986) (No. 86-543) (the "*Burris* case"); and Herbert Blumenthal ("Blumenthal"), appellee in *Herbert Blumenthal v. Dean Witter Reynolds, Inc. and Daniel J. Turov,* decided *sub nom. Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra, petition for cert. filed,* 55 U.S.L.W. 3296 (U.S. October 7, 1986) (No. 86-559) (the "*Blumenthal* case").

The respondents do not dispute the accuracy of the statements of facts set forth in the petitions for a writ of certiorari in these cases. They believe it is helpful to add a comment on the procedural posture of this response.

Following service of the petition for a writ of certiorari in *Jacobson,* the Jacobson respondents, by their counsel, advised the Court by letter that they waived their rights to make a response. In the *Burris* case and the *Blumenthal* case, Burris and Blumenthal elected to make no response. Thereafter, by letter from the Clerk of Court dated November 17, 1986, this Court requested the Jacobson respondents, Blumenthal and Burris to file a response to the petitions for writs of certiorari in these cases. The Jacobson respondents, Burris and Blumenthal, are now complying with that request. In the interests of economy, the respondents have elected to file a consolidated response.

## REASONS FOR GRANTING OR FOR NOT OPPOSING THE GRANT OF A WRIT OF CERTIORARI

Among other reasons, the petitioners have argued that a writ of certiorari should be issued to the Third Circuit Court of Appeals in these cases because there is a conflict among the United States Courts of Appeal on the issue of the enforceability of pre-dispute agreements to arbitrate claims arising under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (the "Exchange Act") and the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO").

Because of the conflict among the Courts of Appeal, the Jacobson respondents and Burris agree that a writ of certiorari should be granted. Blumenthal takes no position whether the Court should issue a writ of certiorari for any reason.

## I.

## THERE IS A CONFLICT BETWEEN THE CIRCUITS AS TO THE ENFORCEABILITY OF PRE-DISPUTE AGREEMENTS TO ARBITRATE CLAIMS ARISING UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934

As the Third Circuit Court of Appeals noted in these cases,

> . . . [O]ur holding that Section 10(b) claims are not arbitrable is consistent with the Court of Appeals for the Ninth Circuit decision in *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986) but conflicts with the holding of the Court of Appeals for the Eighth Circuit in *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986).

*Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197, 1199 n.2.

Before the Third Circuit's ruling in these cases, the Second Circuit, in *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *cert. granted*, 107 U.S. 60 (U.S. October 6, 1986) (No. 86-44) ("McMahon"), held that pre-dispute agreements to arbitrate claims asserted under Exchange Act Section 10(b) ("Section 10(b)") are not enforceable. After the Third Circuit's decision in this case, the Courts of Appeal for the Fifth, Ninth and Eleventh Circuits also held that pre-dispute agreements to arbitrate claims arising under Section 10(b) are not enforceable.[1] The Eighth Circuit's decision in *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d

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[1] *Bustamante v. Rotan Mosle, Inc.*, 802 F.2d 815 (5th Cir., 1986); *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir., 1986), *petition for cert. filed*, 55 U.S.L.W. 3159 (U.S. August 29, 1986) (No. 86-321); and *Wolfe v. E.F. Hutton & Co., Inc.*, 800 F.2d 1032 (11th Cir. 1986) (*en banc*).

*(footnote continues)*

1393 (8th Cir. 1986), *petition for cert. filed,* 55 U.S.L.W. 3296 (U.S. Oct. 7, 1986) (No. 86-578) ("*Phillips*"), has recently been joined by the First Circuit's decision in *Page v. Moseley, Halloarten, Estabrook & Weeden, Inc.,* No. 86-1021, slip op. (November 26, 1986) (available on Lexis, Qenfed library, U.S. App. File) ("Page"), holding pre-dispute agreements to arbitrate Section 10(b) claims enforceable.

The conflict among the Circuits is plain and unavoidable. Resolution of the conflict among the Circuits will be necessary to achieve uniform application of federal law. The respondents recognize that, given the national scope of the activities of many brokerage firms, the broad venue provisions of Section 27 of the Securities Exchange Act of 1934 might permit persons otherwise subject to the *Phillips* or *Page* decisions to bring actions in the Third or other Circuits where pre-dispute agreements to arbitrate Section 10(b) claims are enforceable. Respondents also recognize that customers of brokerage firms who have signed predispute arbitration agreements, who would normally choose to bring an Exchange Act action within and who cannot afford to proceed outside the First or Eighth Circuits will be denied the right to proceed in the judicial forum. In respondents' view, this right is properly secured for Exchange Act claimants in the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits.

Because there is a conflict among the Courts of Appeal, the respondents cannot in good faith, and do not, oppose the petitions for writ of certiorari in these cases. Beyond that, especially because the Court has issued a writ of certiorari in *McMahon,* the Jacobson respondents and Burris believe that granting a writ of certiorari here will materially assist the Court in resolving the questions presented by these cases. *See,* discussion *infra* at 9-14.

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*(footnote continued)*

In addition, in pre-1986 decisions the Sixth, Seventh and Tenth Circuit Courts of Appeals have held pre-dispute arbitration agreements to be unenforceable. *Mansbach v. Prescott, Ball & Turben,* 598 F.2d, 1017 (6th Cir. 1979), *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 558 F.2d 831 (7th Cir. 1977); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore,* 590 F.2d 823 (10th Cir. 1978).

## II.

## THERE IS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL AS TO THE ENFORCEABILITY OF PRE-DISPUTE AGREEMENTS TO ARBITRATE CLAIMS ARISING UNDER THE RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT

The Third Circuit Court of Appeals' "holding that RICO claims based on non-arbitrable predicate offenses are not arbitrable conflicts with the holding of the Court of Appeals for the Second Circuit in *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986)." *Jacobson*, 797 F.2d at 1199, n.2. The Third Circuit's opinion in these cases also conflicts with the decision of the United States Court of Appeals for the First Circuit in *Page* and the decision of the Court of Appeals for the Fifth Circuit in *Mayaja, Inc. v. Bodkin*, 803 F.2d 157 (5th Cir. 1986) ("*Mayaja*").

To the limited extent that the Third Circuit decision in *Jacobson* and the *Burris* cases holds unenforceable pre-dispute agreements to arbitrate RICO claims predicated solely on violations of federal securities laws, the result does not conflict with the decisions in *McMahon* and *Page*. However, the conflict between the reasoning in the *Jacobson* and *Burris* cases, on the one hand, and in *McMahon* and *Page* on the other, remains. The holding in the *Jacobson* and *Burris* cases does conflict with the holding in *Mayaja*.

To the extent that the Third Circuit in the *Blumenthal* case held enforceable pre-dispute agreements to arbitrate RICO actions predicated on mail and wire fraud, the result is consistent with that reached in *Mayaja*. However, the reasoning in *Mayaja* and in *Blumenthal* is different. The Fifth Circuit in *Mayaja* "respectfully decline[d] to follow the reasoning of the Third Circuit." *Mayaja, Inc. v. Bodkin*, 803 F.2d at 163, n.6.

The conflict among and the confusion resulting from these decisions is apparent. Therefore, the respondents cannot in good faith oppose the granting of the petitions for writ of certiorari in these cases.

## III.

## RESPONDENTS DISPUTE THOSE ARGUMENTS FOR CERTIORARI WHICH GO TO THE MERITS OF THE COURT OF APPEALS' DECISION IN THESE CASES; BUT BECAUSE THIS COURT HAS ISSUED A WRIT OF CERTIORARI IN *McMAHON*, THE JACOBSON RESPONDENTS AND BURRIS AFFIRMATIVELY URGE THAT A WRIT OF CERTIORARI BE ISSUED SO THAT THEY MAY HAVE AN OPPORTUNITY TO ADDRESS THE MERITS OF THESE ISSUES FULLY.

The petitioners also argue that this Court should issue writs of certiorari in these cases because the Court of Appeals' decision (1) burdens the federal courts with cases arising under the federal securities laws, thus affecting the administration of justice in the federal courts (*Petition for Certiorari* in *Jacobson*, 6-7; *Petition for Certiorari* in the *Burris* case, 10; *Petition for Certiorari* in the *Blumenthal* case, 13); and (2) is fundamentally incorrect in its resolution of the issues both as a matter of analysis (*Petition for Certiorari* in the *Blumenthal* case, 8-10) and as a matter of conflict with the rationale and/or holding of this Court's decisions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346 (1985) ("*Mitsubishi*") and *Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. 1238 (1985) ("Byrd") (*Petition for Certiorari* in *Jacobson*, 9-12; *Petition for Certiorari* in the *Burris* case, 9; and *Petition for Certiorari* in the *Blumenthal* case, 10-13; 19-20). These arguments necessarily reach the merits of the decisions below.[2]

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[2] The petitioners argue that certiorari should be granted because the decision below increases or fails to decrease litigation in the Federal courts. In and of itself, this argument does not address the merits of the decision below and is not a basis for granting the petitions here. It does not follow that parties whose claims under the federal securities laws or RICO have matured and who want to waive those claims in favor of contractually empowering arbitrators to decide similar rights created by contract will not continue to do so, regardless of the decision below. Furthermore, the decision in these cases does not open the federal courts to a class of cases which were not in the federal courts before these cases were decided. Whatever litigation is in the federal courts under the Exchange Act or RICO is there because Congress

*(footnote continues)*

If the Court had not issued a writ of certiorari in *McMahon,* the respondents would argue that, absent a conflict among the Circuit Courts of Appeal, the merits of the decision in these cases do not warrant review by this Court. However, the Court will likely address the same merits issues in *McMahon.*

Thus, any argument about merits in these responses becomes one not of opposing certiorari but of attempting to influence the Court's ultimate decision on the merits. This would seem best done in a brief on the merits, with an opportunity for both respondents and petitioners to fully address the issues. Thus, the question for respondents becomes whether they should simply limit their response to not opposing the petitions for certiorari and address the merits issues in briefs *amicus curiae* in *McMahon* or whether they should affirmatively urge the Court to grant the petitions in these cases.

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*(footnote continued)*

intended for it to be there, an intent made clear in Congress' mandate of exclusive jurisdiction in the federal courts of all Exchange Act and RICO civil actions. *See, infra,* note 5.

Similarly, although there may be hundreds or even thousands of cases filed in the federal courts under the federal securities laws, it is impossible to determine from the numbers supplied by the petitioners ( *Petition* in *Jacobson* at 6, n.8) how many of these cases are otherwise subject to arbitration agreements and how many of these cases arise under the Exchange Act. Perhaps the best measure of the number of cases involving both those factors is the number of reported district court decisions involving the issue of the enforceability of pre-dispute agreements to arbitrate claims under Section 10(b). Appendix D to the *Petition* in the *Jacobson* case shows 107 such cases have been filed in the district courts within the jurisdiction of the twelve United States Courts of Appeal. Thus, on average, approximately nine such cases have been filed in each of the twelve federal judicial circuits. Whether the failure to eliminate those cases supports a petition for certiorari is doubtful in the absence of conflict among the Courts of Appeal.

To the extent that the petitioners' "administration of justice" arguments are predicated on the argument that there would be no increase or would be a decrease in federal court litigation if the Court of Appeals had decided the issues in these cases in accordance with petitioners' views, then these arguments do reach the merits.

For two reasons, the Jacobson respondents and Burris go beyond simply not opposing the petitions in these cases, and urge the Court to issue certiorari and to consolidate these cases with *McMahon.*

First, the *Jacobson* respondents and *Burris* must be uncertain whether or not they will be permitted to file briefs *amicus curiae* in *McMahon.*[3]

Second, even if permitted to file briefs *amicus curiae* in *McMahon,* any such briefs would be more limited than a brief on the merits. Sup.Ct.R. 36.2, 36.3. This may be a significant limitation in that there are a number of arguments on the merits, each of which calls for a careful, thoughtful and detailed analysis. Even the relatively less difficult questions concerning the effect of the non-waiver provisions of Exchange Act Section 29(a), 15 U.S.C. § 78cc(a), on an arbitration agreement's waiver of the provisions of Section 27 of the Exchange Act, 15 U.S.C. § 78aa; the vitality of the core of the *"American Safety"* doctrine [4]; and the relationship of *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight Systems, Inc.,* 450 U.S. 728 (1981) and *McDonald v. City of West Branch,* 466 U.S. 284 (1984) to *Mitsubishi* in a non-international setting require detailed analysis. In addition, there is the difficult issue of the scope and effect of *Mitsubishi,* not simply in terms of its applicability to non-international disputes or of the continued vitality of the core of the *American Safety* doctrine, but also in terms of the fundamental arbitrability of substantive federal, statutory rights given that (a) Congress has vested exclusive jurisdiction of Exchange Act and RICO claims in the federal courts,[5] (b) the United States Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "Arbitration Act"), at

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[3] The Jacobson respondents have requested that the *McMahon* parties consent to a brief *amicus curiae.* The *McMahon* respondents have consented. Counsel for petitioners in *McMahon* have refused their consent.

[4] *See, American Safety Equipment Corp. v. J. P. Maguire & Co.,* 391 F.2d 821 (2d Cir. 1968). *See also, Mitsubishi, supra,* 105 S.Ct. at 3355-60.

[5] Exclusive federal jurisdiction of Exchange Act claims is mandated in Section 27 of the Exchange Act, 15 U.S.C. § 78aa. Exclusive federal jurisdiction of RICO claims is provided for in 18 U.S.C. § 1964(c). As reviewed in *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 105 S. Ct. 3275, 3280-1

*(footnote continues)*

least on its face, does not purport to empower parties to an arbitration agreement to confer jurisdiction of federal claims on an arbitration tribunal; (c) the Arbitration Act, at least on its face, does not purport to confer any jurisdiction over cases arising under federal law on any arbitration tribunal; (d) there appears to be no inherent power in the parties to a dispute to confer jurisdiction of cases arising under federal law on any tribunal—whether state, federal or otherwise—and especially where Congress (1) has vested federal courts with exclusive jurisdiction and (2) has not itself authorized the parties to consent to adjudication of claims arising under federal law before a tribunal to whom Congress has not specifically transferred jurisdiction as, for example, Congress has done in the United States Magistrate's Act, 28 U.S.C. § 636(c). The Jacobson respondents and Burris believe these arguments and questions will be best explored for the benefit of the parties and the Court in briefs on the merits in these cases.

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*(footnote continued)*

(1985), the legislative history of RICO shows that its private remedy was patterned after the anti-trust prototype of Section 4 of the Clayton Act, 15 U.S.C. § 15. Well before the RICO legislation was enacted, this Court had held that virtually identical jurisdictional language in Section 4 of the Clayton Act conferred exclusive jurisdiction on the federal courts of anti-trust claims. *Freeman v. Bee Machinery Corp.*, 319 U.S. 448, 451 n.6, *reh. denied*, 320 U.S. 809 (1943). As one court has noted, "it would be anomalous . . . to hold that the jurisdictional grant under the RICO statute did anything other than create exclusive federal jurisdiction over civil claims by persons injured by violations of 18 U.S.C. § 1962." *County of Cook v. Midcon Corp.*, 574 F.Supp. 902, 912 (N.D. Ill. 1983).

## CONCLUSION

The scope of federal policy favoring enforcement of agreements to arbitrate commercial disputes is the subject of conflict and confusion among the Courts of Appeal. The respondents recognize that the conflict will continue until this Court resolves it. Although they cannot and do not challenge the result or holdings in these cases, the respondents also cannot in good faith dismiss the existence of the conflict or the need to resolve it. Given that fact and given the fact that this Court has granted the petition for certiorari in *McMahon,* the Jacobson respondents and Burris concur with the petitioners that the Court should issue a writ of certiorari to review the decisions below. Blumenthal does not oppose the issuance of a Writ of Certiorari.

Dated: December 17, 1986

Respectfully submitted,

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